APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23083

MARKWELL AND HARTZ, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 23214

NATIONAL LABOR RELATIONS BOARD
Petitioner,

versus

BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO,
Respondent.

Petitions for Review and Enforcement of an Order of the National Labor Relations Board.
(Louisiana Case)

(December 4, 1967.)

Before RIVES and WISDOM, Circuit Judges, and CONNALLY, District Judge

CONNALLY, District Judge: The above styled and related actions have been consolidated. Both result from picketing by the Building and Construction Trades Council of New Orleans, AFL-CIO ("Council" or "Trades Council" hereafter), of a common situs construction project, which the National Labor Relations Board has held to constitute a secondary boycott, violative of Section 8(b)(4)(B) of the Labor-Management Relations Act [29 U.S.C.A. 158(b)(4)(B)]. In the earlier appeal (No. 23083) by the employer with whom the dispute existed, we affirm [1] the findings of the Board that the employer is not entitled to further relief. In the latter (No. 23214), we likewise agree with the Board, and order enforcement.

Briefly stated, the facts are these. In September of 1963 Markwell and Hartz, Inc. was the general contractor for the expansion of a filtration plant at the East Jefferson Water Works, District No. 1, in Jefferson Parish, Louisiana. Prior to beginning construction, Markwell and Hartz entered into an agreement with District 50 of the United Mine Workers of America whereby District 50 became the recognized bargaining agent for Markwell and Hartz's employees. Also prior to beginning construction, Markwell and Hartz contracted with two subcontractors, Binnings Construction Company, Inc. ("Binnings") and Walter J. Barnes Electrical Company ("Barnes") to perform the pile driving and electrical work, respectively. It performed the remainder of the work, consisting of approximately 80%, itself. Employees of both Binnings and Barnes were represented by the respondent Trades Council.

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[1] This appeal has not been seriously urged.

Immediately a dispute arose between Markwell and Hartz and the Trades Council. The latter sought to become the bargaining representative of the Markwell and Hartz employees. On October 17, 1963, the Council began to picket the project.

Shortly after the picket line appeared, Markwell and Hartz endeavored to insulate its subcontractors Binnings and Barnes, who were neutrals in the labor controversy, from the effects of the picketing. It did so by establishing four separate gates, three for the exclusive use of the subcontractors, their employees and suppliers; the fourth for the exclusive use of its own employees and suppliers. Despite the clear delineation by signs distinguishing between the subcontractors' gates and that for the use of the general contractor, the Council continued to picket all gates until enjoined by the District Court for the Eastern District of Louisiana on January 15, 1964. As a result of the picketing, the employees of Binnings and of Barnes refused to work on the project.

Acting on a complaint lodged by Markwell and Hartz, the National Labor Relations Board entered an order generally favorable to Markwell and Hartz, declaring that after November 16, 1963 (at which time the gates had been clearly marked) the Council had engaged in an unfair labor practice violative of Sections 8(b)(4)(i) and (ii)(b) of the Act. The Board found that one of the purposes of the picketing of the subcontractors' gates was to cause Binnings and Barnes (the neutrals) to cease doing business with Markwell and Hartz. The Board issued a typical cease and desist order.

The case is before this Court primarily on the Board's petition to enforce its order, while Markwell and Hartz seeks additional findings in its favor.

At the outset, it should be noted that the dispute that gave rise to the picketing was not between Markwell and Hartz and its employees. Nor was the dispute, in practical effect, between Markwell and Hartz and the Trades Council. The real adversaries were District 50 of the United Mine Workers and the Trades Council, the latter being the also-ran in the race to see who would be the bargaining representative of Markwell and Hartz's employees. District 50 has appeared as *amicus curiae,* urging enforcement of the Board's order. Hence the dispute was jurisdictional in nature.

It is the Trades Council's position that the facts of this case bring it within the ambit of *Local 761, IUE, etc. v. NLRB,* 366 U. S. 667 (1961), popularly known as the *General Electric* case. The Trades Council further argues that the *General Electric* case and the *Carrier* case [*United Steelworkers v. NLRB,* 376 U. S. 492 (1964)], have, *sub silentio,* overruled the Supreme Court's decision in *NLRB v. Denver Building & Construction Trades Council,* 341 U. S. 675 (1951). We do not agree with this position.

Attempts to distinguish between protected primary picketing and the forbidden secondary activity—particularly at a common situs where employees of the primary and of the secondary employers work side by side—have been the source of much litigation both before the Board and in the Courts.[2] Much of the uncertaintly which formerly shrouded this question has been clarified, we think, by *General Electric* wherein the question and the various authorities are reviewed at length, and by *Carrier* which follows and approves *General Electric.* These are the cases primarily relied upon by the Trades Council.

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[2] See, e.g., United Brotherhood of Carpenters, 81 N.L.R.B. 802; United Electrical Workers (Ryan Const. Corp.), 85 N.L.R.B. 417; Retail Fruit & Vegetable Clerks (Crystal Palace Mkt.), 116 N.L.R.B. 856; Superior Derrick Corp. v. N.L.R.B. 273 F.2d 891 (5th Cir. 1960).

In *General Electric,* that company was the primary employer engaged in a dispute with its own employees at its own plant. A number of subcontractors were performing various services for General Electric at the plant site. Separate gates were clearly designated for the exclusive use of these subcontractors. The work performed by the subcontractors was of different types, the distinction being emphasized by the court as "routine maintenance service" —which at times was performed by General Electric's own employees, and occasionally subcontracted out—as distinguished from "specialized work of a capital improvement nature" (366 U. S. at p. 669). There Mr. Justice Frankfurter, speaking for the Court, without dissent, rejected the argument of the Union that all picketing at the plant of the struck employer should be considered primary, stating:

> "In rejecting the ownership test in situations where two employers were performing work upon a common site, the Board was naturally guided by this Court's opinion in *Rice Milling,* in which we indicated that the location of the picketing at the primary employer's premises was 'not necessarily conclusive' of its legality. 341 U. S. at 671. Where the work done by the secondary employee is unrelated to the normal operations of the primary employer, it is difficult to perceive how the pressure of picketing the entire situs is any less on the neutral employer merely because the picketing takes place at property owned by the struck employer. The application of the *Dry Dock* tests to limit the picketing effects of the employees of the employer against whom the dispute is directed carries out the 'dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.' *Labor Board v.*

Denver Building Council, supra, at 692." 366 U. S. at p. 679.

And further, the Court stated:

". . . The key to the problem is found in the type of work that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings." Id. at p. 680.

Three years later in *Carrier* the Court, again without dissent, rejected the theory that ownership or control of the site of the picketing was controlling. There Carrier was engaged in a dispute with its employees, at its own plant. The picketing in question took place at a railroad spur track, owned by the railroad and used exclusively by the railroad and its employees, but located immediately adjacent to Carrier's plant and used for the delivery of supplies and removal of the manufactured products of Carrier. Approving and reaffirming the test of *General Electric,* the Court in *Carrier* held that the ownership of the railroad spur was immaterial, and that it was, in fact, no more than another gate to the Carrier plant; hence the picketing at such gate to inform the railroad and its employees who were suppliers of Carrier of the existence of the dispute was primary and protected activity.

Thus the question posed here is whether the work of subcontractors Binnings and Barnes was "related to the normal operations" of Markwell and Hartz (as, for example, ordinary maintenance as in *General Electric*), in which event the picketing is primary; or whether it is unrelated to the normal operations (as "of a capital improvement nature").

While it would seem clear from a statement of this test that the work of Binnings and Barnes, consisting of specialized work for which Markwell and Hartz was unequipped and unable to perform itself, was of the unrelated variety, we need not speculate upon the answer to this question. It is answered authoritatively in *Denver, supra.* That case involved a construction project common situs where employees of the general and the subcontractors worked side by side. In a dispute with the subcontractor, picketing was likewise directed at the employees of the prime. There, as here, it was found that an object of such picketing was to force or require the cessation of business, one with the other, and to force a termination of the subcontract. Deciding the question here in controversy, the Court stated:

> "We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so. The Board found the relationship between [the prime contractor] and [the subcontractor] was one of 'doing business' and we find no adequate reason for upsetting that conclusion." 341 U.S. at pps. 689-690.

The Trades Council argues that there is a conflict between *Denver,* on the one hand, and *General Electric* and *Carrier,* on the other. We find no such conflict. *Denver* is cited with approval in *General Electric.*

The Council further argues that *Denver* should be limited to its precise facts, that is, where the dispute is with a

subcontractor and the general contractor is a neutral. Such a position is supported by neither logic nor authority. The statute, in condemning the secondary boycott, makes no such distinction and we are unable to say that it is less an unfair labor practice to bring economic pressure on a subcontractor to induce him to breach his contract and cease doing business with the prime, rather than where the parties are reversed. See *Piezonki v. N.L.R.B.*, 219 F.2d 879 (4th Cir. 1955); *Local Union No. 55 (PBM)*, 108 N.L.R.B. 363, affd. 218 F.2d 226 (10th Cir. 1954); *Metal Polishers Union*, 86 N.L.R.B. 1243 (cited in *Denver Trades Council*, 341 U. S. at 690); *Cf. Construction & Gen. Lab. Loc. U. No. 438 v. Hardy Eng. & Const. Co.*, 354 F.2d 24 (5th Cir. 1965).

Holding as we do that the subcontractors here were entitled to protection from the Trades Council's picketing, the Trades Council was obliged to restrict its picketing in conformity with the *Moore Dry Dock* criteria.[3] See *Sailor's Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547 (1950). The Board was warranted in concluding that the Trades Council's picketing was not in accord with *Moore Dry Dock* requirements and, therefore, an unfair labor practice.

On October 9, 1967, long after submission of this action, counsel for the N.L.R.B. filed with the clerk of this Court slip opinion of the Court of Appeals for the Sixth Circuit in *N.L.R.B. v. Nashville Bldg. & Construction Trades Council*, Oct. 5, 1967, . . . F.2d . . . This opinion deals with precisely the question considered here, in a similar controversy between Markwell & Hartz, the Nashville Council, and the United Mine Workers. We have considered that opinion as well as the brief filed October 27, 1967, by New

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[3] The Board has often applied Moore Dry Dock standards to construction site picketing. See I.C.G. Elec. Inc., 142 N.L.R.B. 1418 (1963); Levitt Corp., 127 N.L.R.B. 900 (1960); St. Bridget's Catholic Congregation, Inc., 122 N.L.R.B. 1341 (1959).

Orleans Building and Trades Council in reply thereto. We cite the Sixth Circuit opinion in support of the views expressed above, and agree with the observation there made (last paragraph) that "if appellant's contention in this case is to prevail, it is a decision for the Supreme Court or for the Congress."

Enforcement of the Board's order is granted.

RIVES, Circuit Judge, specially concurring:

It seems to me that the work of the subcontractors Binnings and Barnes was "related to the normal operation" of the general contractor Markwell and Hartz, Inc. (M & H). M & H was obligated by contract to complete the filtration plant expansion job. It decided to perform about four-fifths in cost of the project with its own employees and to subcontract the balance. The pile-driving contract was awarded to Binnings and the electrical work to Barnes. When Binnings' crews honored the picket line, M & H used its own employees to complete the pile driving. While Barnes' electrical work was more highly specialized, I do not find any contention that M & H could not have employed men to do that work.

The two dissenting members of the Board definitely stated that, "In applying the *General Electric* standards to the instant case, we find that the work of Binnings and Barnes was related to the normal operations of M & H, the general contractor." (R. 112). The reasons for that finding were then elaborately stated. The three majority members of the Board agreed that " * * * the work of the neutral subcontractors in one sense is 'related to M & H's normal operations'," but nevertheless thought that the dissent's analysis "runs counter to firmly established principles governing common situs picketing in that (the construction) industry." (R. 96.)

When the work done by the secondary employees is related to the normal operations of the primary employer

there remains a distinction between picketing at the situs of the primary employer and picketing at a common situs where two or more employers are performing separate tasks on common premises. It seems to me that the opinion in *General Electric* clearly recognizes that distinction and approves the four *Moore Dry Dock* standards as applicable to common situs picketing. (See 366 U. S. at 676-679.) The *Carrier* case went no further than *General Electric* and continued to recognize the importance of the location of the picketing (376 U. S. at 497).

I agree that *General Electric* and *Carrier* are not inconsistent with *Denver*. *Denver* relates to common situs picketing. *General Electric* and *Carrier* involve illegal picketing at the premises of a struck manufacturer. Except for this difference in reasoning, I concur fully with Judge Connally.

WISDOM, dissenting:

I respectfully dissent.

I agree with the Court that in this case the *General Electric* work-related standard should be applied. The difficulty I have with the majority opinion is that the Court accepts the Board's cavalier consideration of *General Electric* and enforces the Board order—although the Board rejected the work-related standard. The Board inferred an unlawful objective simply from the picketing of the reserved gate. I am with the dissenting Board members in their view that there should be an inquiry into whether the appeals through picketing to secondary employees constituted permissible primary activity. I would remand the case to the Board for a finding on the issue of relatedness with suggestions that the Board formulate criteria for determining relatedness in common situs cases, carrying out the principles expressed in *General Electric* and *Carrier*.

With deference, I must say that I am not as certain as

the Court that *General Electric* and *Carrier* clarified *Denver* and do not conflict with that decision. *Denver* (which did not involve reserved gates) applied the *Moore Dry Dock* criteria—regardless of whether the secondary employer's work was related to the normal operations of the primary employer. In the Board's decision in *N.L.R.B. v. Nashville Building and Construction Trades Council,* 164 NLRB No. 50, enforced, 6 Cir. 1967, F.2d , involving the same question at issue here in a controversy also involving Markwell & Hartz, the Board said:

> "For in view of our holding in Building and Construction Trades Council of New Orleans, AFL-CIO (Markwell & Hartz, Inc.) 155 NLRB 319, that the legality of picketing at a common situs in the construction industry is to be determined under the *Moore Drydock* standards, rather than the special guidelines laid down by the Supreme Court in Local 761, IUE (General Electric Corporation v. N.L.R.B.), 366 U. S. 667, the *work relationship test set forth in the latter is inapposite herein.*" (Emphasis added.)

In short, the Board's *Nashville decision* acknowledges explicitly that a majority of that Agency is of the view that the standards announced by the Supreme Court in *General Electric* and *Carrier* should not be applied in the context of construction industry picketing.

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The provisions of Section 8(b)(4) [1] reflect "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employ-

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[1] Section 8(b)(4) of the amended Act makes it an unfair labor practice for a union—

> (i) to engage in, or to induce or encourage any individual * * * to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, material or commodities or to perform any services; or

ers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own". *Denver,* 341 U.S. at 692.[2] Courts and the Board have had a hard struggle to give meaning to this policy in concrete cases. "Through the many shifts of emphasis and approach manifested by the precedents, perhaps the most stable element has been discord".[3]

Section 8(b)(4), the secondary boycott provision, prohibits all union activity "where . . . an object thereof is forcing or requiring" an employer to cease doing business with "any person". Although the language of the section is broad, the section prohibits only secondary picketing.[4] Judge Learned Hand has said: "The gravamen of a sec-

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(ii) to threaten, coerce, or restrain any person * * * where in either case an object thereof is:

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(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

[2] N.L.R.B. v. Denver Building & Constr. Trades Council, 1951, 341 U.S. 675, 692.

[3] Lesnick, "The Gravamen of the Secondary Boycott", 62 Colum. L. Rev. 1363, 3165 (1962). On the issue generally, see Lesnick, Koretz, "Federal Regulation of Secondary Strikes and Boycotts-Another Chapter", 59 Colum. L. Rev. 125, 129 (1959); Lesnick, Zimmerman, "Secondary Picketing and the Reserved Gate: The *General Electric* Doctrine", 47 Va. L. Rev. 1164 (1961); Comment, "Common Situs Picketing and the Construction Industry", 54 Geo. L. J. 962 (1966); Note, 44 Texas L. Rev. 794 (1966).

[4] See Lesnick, The Gravamen of the Secondary Boycott, 62 Colum. L. Rev. 1363, 1398-99 (1962), where the author states: "The major supports, in the statute as enacted in 1947, for a rejection of a literal approach to section 8(b)(4) have been sections 7 and 13. Section 7 purports to guarantee labor the right to engage in concerted activities, including strikes and picketing, for the purpose of mutual aid or protection, and section 13 permits inroads on that right only as specifically provided for in the act. It has been asserted that section 8(b)(4), as construed by a literal approach, is so pervasive that it 'does violence'

ondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands".[5]

The line between primary and secondary activity is relatively easy to draw where the primary and secondary employers have separate work-sites. Thus, union activity occurring at a manufacturer's own premises, and seeking no more than the disruption of his own normal operations, is considered primary and within the traditional area of protected union activity. On the other hand, activity extending beyond the premises of the primary employer to those of another employer, and designed to disrupt the operations of the latter employer, is secondary and prohibited. Compare *N.L.R.B. v. International Rice Milling Co.*, 341 U. S. 665, 672, with *N.L.R.B. v. United Brotherhood of Carpenters, etc.*, 10 Cir. 1950, 184 F.2d 60, cert. denied, 341 U. S. 947. And see generally *Retail Fruit & Vegetable Clerks Union (Crystal Palace Market) v. N.L.R.B.*, 9 Cir. 1957, 249 F.2d 591, 597-600.

A more difficult problem is presented in the common situs cases—"situations where two employers were performing separate tasks on common premises". *General Electric*, 366 U. S. at 676. Early in the development of the law under section 8(b)(4), therefore, the Board evolved criteria to aid in determining whether picketing at a com-

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to sections 7 and 13, and an alternative approach to the section must therefore be adopted. This contention rests on more than a literal reading of section 13; it finds in that section a mandate, not only to avoid, resort to general statements and policies, expressed or implicit in the act, to restrict labor's use of its traditional weapons, but also to shrink from accepting on its face the directions of an articulated prohibition when to do so would seem to go 'too far.'"

[5] International Board of Electrical Workers v. N.L.R.B., 2 Cir. 1951, 181 F.2d 34, aff'd, 341 U.S. 694.

mon situs was primary or secondary. In *Sailor's Union (Moore Dry Dock Co.)*, 92 NLRB 546, 549 (1950), a case in which the primary employer's ship was temporarily located at the secondary employer's dock, the Board stated:

> In the kind of situation that exists in this case, we believe that picketing * * * is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of the dispute is located on the secondary employer's premises: (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the locations of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer. [Emphasis in original.]

The Board has since applied these "*Moore Dry Dock* standards" in common situs situations generally,[6] whether the premises were owned by the secondary employer (as in *Moore,* itself) the primary employer,[7] or some third party,[8]

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[6] This and other courts have approved the Board's general application of the Dry Dock standards. Local 761, Electrical Workers v. N.L.R.B. (General Electric Co.), 366 U.S. 667, 676-679; N.L.R.B. v. Truck Drivers & Helpers Local Union No. 728, 5 Cir. 1956, 228 F.2d 791, 796; N.L.R.B. v. International Brotherhood of Electrical Workers, Local 861, 5 Cir. 1965, 353 F.2d 736; N.L.R.B. v. Local 254, Building Service Employees, 1 Cir. 1966, 359 F.2d 289, 292; New Power Wire & Electric Corp. v. N.L.R.B., 2 Cir. 1964, 340 F.2d 71, 74; N.L.R.B. v. Highway Truckdrivers, Local No. 107, 3 Cir. 1962, 300 F.2d 317, 321; Piezonki v. N.L.R.B., 4 Cir. 1955, 219 F.2d 879, 883; N.L.R.B. v. Chauffeurs, Local Union No. 135, 7 Cir. 1954, 212 F.2d 216, 219; N.L.R.B. v. International Hod Carriers, Local 1140, 8 Cir. 1960, 285 F.2d 397, 400-401, cert. denied, 366 U.S. 903; Retail Fruit & Vegetable Clerks Union, Local 1017 v. N.L.R.B., 9 Cir. 1957, 249 F.2d 591, 595-597; N.L.R.B. v. Local Union No. 55, 10 Cir. 1954, 218 F.2d 226, 231; Seafarers International Union v. N.L.R.B., D.C. Cir. 1959, 265 F.2d 585, 589.

[7] As in Retail Fruit & Vegetable Clerks Union, Local 1017, 116 NLRB 856, enforced, 9 Cir. 1957, 249 F.2d 591.

[8] As in Atomic Projects & Production Workers, 120 NLRB 400, enforced, D.C. Cir. 1959, 262 F.2d 931.

and whether the picketing union's dispute was with the general contractor [9] or the subcontractor.[10]

Common situs picketing in the construction industry raises special problems. The building trades unions have always contended that construction of a building is an integrated enterprise in which the subcontractors are interrelated allies of the prime contractor, not independent neutrals.[11] In *Denver*, however, the Supreme Court rejected this contention. Instead, the Court looked to the traditional legal concept of the relationship between a prime contractor and his subcontractors: The subcontractors are independent contractors whose employees are not the employees of the prime contractors.[12] As separate legal entities, they are entitled to protection from secondary boycotts. The construction industry, therefore, is subject to the same restrictions as are other industries in regard to common

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[9] Local Union No. 55 (PBM), 108 NLRB 363, enforced, 10 Cir. 1954, 218 F.2d 226, Eau Claire and Vicinity Building and Construction Trades Council, 122 NLRB 1341; Hermandad de Trabajadores de la Construccion, 127 NLRB 900.

[10] E.g., Brotherhood of Painters, Local Union No. 193, 110 NLRB 455; International Association of Machinists, Local Lodge 889, 120 NLRB 753; International Brotherhood of Electrical Workers, Local 861, 142 NLRB 1006, enforced, 5 Cir. 1965, 353 F.2d 736; Millwrights Local Union No. 1102, 155 NLRB 126.

[11] "The building trades unions have been advancing this argument before Congress (thus far without success) for all of the years since Congress adopted the 'secondary boycott' provisions of the Taft-Hartley Act, 61 Stat. 136, 141-42 (1947), as amended, 29 U.S.C. § 158(b)(4) (1964), . . ." N.L.R.B. v. Nashville Building and Construction Trades Council, 6 Cir. 1967, F.2d .

[12] "We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overriden without clear language doing so. . . ." N.L.R.B. v. Denver Building and Construction Trades Council, 1951, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284.

situs picketing.[13] For purposes of the instant case, it is important to note that in *Denver,* the Court did not consider the type of work performed by the subcontractor. The test was not the *relatedness* of the subcontractor's work to the normal operations of the prime contractor; the test was whether one of the *objects* of the picketing was to force the prime contractor to cease doing business with the subcontractor.

Denver has been criticized. Numerous bills have been introduced in Congress to overrule its holding. But *Denver* still stands. Here the Board rested its decision squarely on *Denver* and *Moore Dry Dock.*

The Trades Council and the dissenting members of the Board rely on *General Electric.* They contend that under *General Electric* the lawfulness of reserved gate picketing

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[13] *Denver* would be distinguishable from the instant case under the rationale set forth by Lesnick, *supra* note 3, who poses the crucial question thus: "does the picketing union intend to subject the secondary employer to a loss of the services of his employees broader in impact than would be directly caused by the unavailability, as a result of the complete success of the strike, of the services of the primary employees? If so, the picketing is secondary; otherwise, it is primary." 62 Colum. L. Rev. at 1414. "The 'intent' that is significant . . . is the intent to subject the secondary to pressure different in kind from that generated against him by a primary strike." Id. at 1412. Under this analysis, where the union dispute is with the general contractor and pressure is put on the neutral subcontractor, the subcontractor is at worst faced with his men off work—a result that would follow if the union were successful in its primary boycott against the general. But where the dispute is with the subcontractor and pressure is put on the general's employees, the general may be faced with a cessation of work on the entire job—a result that would not necessarily occur if the primary boycott against the subcontractor were successful. Thus in the first case the picketing would be lawful (our case) in the second, unlawful (*Denver*). The Supreme Court, in *Denver,* however laid no groundwork for application of this rationale, and this Court rejected it explicitly in Superior Derrick Corp. v. N.L.R.B., 5 Cir. 1960, 273 F.2d 891. General Electric contains nothing that would now convince us otherwise.

as a primary activity depends on "the type of work that is being performed by those who use the separate gate". 366 U. S. at 680.

In *General Electric* the Court recognized that the distinction between primary and secondary activities "does not present a glaringly bright line". But the Act requires that a line drawn, even if it be "more nice than obvious". The Court addresesd itself to all secondary boycott cases:

> Almost all picketing even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success. (citation omitted) *But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer.* (citation omitted) (Emphasis supplied.)

As the dissenting Board members stated:

> The whole thrust of the Court's *General Electric* decision and the *Carrier Corporation* decision is that the inference of unlawful object cannot be based simply on the fact that the picketing occurs at gates used solely by neutral employees, for the proviso to Section 8(b)(4)(B) protects all primary strike pressures which are applied with the object of halting the day-to-day operations of the struck employer. . . . The Court expressly rejected the view of the Court of Appeals for the Second Circuit "that picketing at the site of a strike could be directed at secondary employees only where incidental to appeals to primary employees." In so doing, the Court firmly established the proposi-

> tion that direct appeals to employees of neutrals "whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt" constitute protected primary activity....

General Electric involved appeals to neutral subcontractors. "The key to the problem is found in the type of work that is being performed by those who use the separate gate".

In *Carrier* the Court used the same key. Referring to *General Electric*, the Court observed:

> The Court accepted the approach neither of the Board nor of the Union. The location of the picketing, though important, was not deemed of decisive significance; picketing was not to be protected simply because it occurred at the site of the primary employer's plant. Neither, however, was all picketing forbidden where occurring at gates not used by primary employees. The legality of separate gate picketing depended upon the type of work being done by the employees who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if their work was unrelated to the day-to-day operation of the employer's plant, the picketing was an unfair labor practice. The order of the NLRB was vacated to permit the termination of the case in accordance with the proper test. 376 U. S. at 497-98.

The Board attempts to distinguish away *General Electric* and *Carrier* on the ground that they were the product of the "lenient treatment . . . given to strike action taking place at the separate premises of a struck employer". Those decisions, so the Board and the Court here say, were

not intended to upset the traditional approach to common situs problems in the construction industry. Relying therefore on Denver (although *Denver* did not involve a separate gate) and on the *Moore Dry Dock* criteria, the Board found that the timing and the picketing at the reserved gates were not intended to reach the employees of Markwell and Hartz but had the unlawful *object* of inducing strike action by the employees of neutral Binnings and Barnes.

General Electric and *Carrier* cannot be brushed off lightly. They represent an attempt to show in what circumstances picketing of a secondary employer is permissible. Under *General Electric,* not all independent contractors are neutrals: They lose their neutral status when their work is related ("necessary") to the normal or day-to-day operations of the primary employer.

Here the Board apparently limited the use of the term "common situs" to situations where the primary and secondary employers are engaged in operations on premises owned by a third person or by a secondary employer. But the Supreme Court in *General Electric* used the term "common situs" to refer to any location where both the primary and the secondary employers were present. 366 U. S. at 676. The Board itself, in *Crystal Palace Market,* 116 NLRB 856, 859 (1956) stated: "[Moore Dry Dock] principles should apply to all common situs principles, including cases where, as here, the picketed premises are owned by the primary employer. We can see no logical reasons why the legality of such picketing should depend on title to property." The effect of the Board's decision is to apply more rigid standards to the construction industry than to the manufacturing industry. Any prime contractor would be able to frustrate the purposes of picketing by opening gates reserved for his subcontractors.

The Board assumes that if the related-work standard is applied to common construction situs, *General Electric* must be considered as having overruled *Denver sub silentio*. In *Denver*, however, the Court focused on the point that contractors and subcontractors on a construction project are not *necessarily* so interconnected that they should all be regarded as one entity. The Court did not hold that as a matter of law all independent contractors on a common situs must be considered as neutrals. In *General Electric* the Court accepted the *Denver* holding that subcontractors are separate legal entities and accepted the principle that the union may appeal to employees of a secondary employer. The Court then focused on the criteria for determining when and how the union may reach the employees of the secondary employer. The touchstone furnished by *Carrier* as well as by *General Electric* is relatedness of work. To the extent that the conclusions in *Denver* were arrived at independent of any consideration of relatedness, those conclusions must be considered as modified by application of the relatedness standard set down in *General Electric*. Here, therefore, the Board should have made a finding on the issue of relatedness. An unlawful object under Section 8(b)(4) cannot be inferred simply from the fact that the union has picketed at a gate reserved for the subcontractors' employees.

Since the Board has considered *General Electric* inapposite and has not made any finding on the issue of relatedness of work, the case should be remanded to the Board for such a finding. The Board should make the initial determination, not the Court. It is better able than this Court to formulate criteria in light of preserving the statutory balance between "the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own". *Denver*, 341 U. S. at 692.

The dissenting members of the Board would apply the "related work" standard only where the dispute is with the general contractor. I agree with the majority on this point: "The plain logic of their position is equally applicable where the primary dispute is with a building subcontractor whose employees are working closely with employees of other subcontractors or those of the general contractor."

The statute, in condemning the secondary boycott, makes no such distinction and we are unable to say that it is less an unfair labor practice to bring economic pressure on a subcontractor to induce him to breach his contract and cease doing business with the prime, rather than where the parties are reversed. See *Piezonki v. N.L.R.B.*, 4 Cir. 1955, 219 F.2d 879; Local Union No. 55 (PBM), 108 NLRB 363, aff'd 10 Cir. 1954, 218 F.2d 226, *Metal Polishers Union*, 86 NLRB 1243 (cited in *Denver Trades Council*, 341 U. S. at 690); *Cf. Construction & Gen. Lab. Loc. U. No. 438 v. Hardy Eng. & Const. Co.*, 5 Cir. 1965, 354 F.2d 24.

The Court cites with approval *N.L.R.B. v. Nashville Bldg. & Construction Trades Council*, Oct. 5, 1967, F.2d , upholding the Board on the precise issue before us now. Unlike the Court in this case, however, the Sixth Circuit made no inquiry into whether the work of the secondary employer was related to that of the primary employer. The Sixth Circuit accepted, apparently with no reservations, that picketing of reserved gates is unlawful. The majority quote Judge Edward's observation "if appellant's contention in this case is to prevail, it is a decision for the Supreme Court or for Congress". I would put it the other way. There is nothing in *General Electric* or *Carrier* to suggest that the construction industry should be treated differently from other industry. The power to carve out an exception to the Act is a power that reposes in Congress—not in the Board, not in this Court.

United States Court of Appeals for the Fifth Circuit

MARKWELL AND HARTZ, INC., *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 23083
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO, *Respondent.*	No. 23214

DECREE

Before: Rives and Wisdom, Circuit Judges, and Connally, District Judge.

BY THE COURT:

The above consolidated cases came on to be heard upon a petition of Markwell and Hartz, Inc. to review an order of the National Labor Relations Board, dated October 25, 1965, and upon a petition of the National Labor Relations Board to enforce said order against Building and Construction Trades Council of New Orleans, AFL-CIO. The Court heard argument of respective counsel on January 23, 1967, and has considered the briefs and transcript of record filed in this cause. On December 4, 1967, the Court,

being fully advised in the premises handed down its opinion granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceedings be enforced, and that Building and Construction Trades Council of New Orleans, AFL-CIO, its officers, agents, and representatives, abide by and perform the directions of the Board in said order contained.

ENTERED: December 27, 1967

(ORIGINAL FILED—DECEMBER 27, 1967)

APPENDIX B

155 NLRB No. 42

D-6614
New Orleans, La.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO

and

Case No. 15-CC-201

MARKWELL AND HARTZ, INC.

DECISION AND ORDER

Upon charges duly filed by Markwell and Hartz, Inc., herein called M & H, the General Counsel of the National Labor Relations Board by the Regional Director for Region 15 issued a complaint dated January 10, 1964, against the Building and Construction Trades Council of New Orleans, AFL-CIO, herein called Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of a hearing before a trial examiner, were duly served upon the Respondent and the Charging Party. On January 17, 1964, Respondent filed its answer admitting certain allegations of the complaint, but denying the commission of any unfair labor practices.

On March 17, 1964, the Respondent, the Charging Party, and the General Counsel entered into a stipulation of facts and motion to transfer this proceeding directly to the Board for issuance of a Decision and Order after the filing of briefs and without further hearing. The stipulation states in substance that the parties waive their rights to a hearing before a trial examiner and to the issuance of a

trial examiner's decision, and that the charge, amended charge, complaint, answer, the stipulation, and the transcript compiled and exhibits received in evidence at a hearing before a United States District Court, Eastern District of Louisiana, New Orleans Division, in the case of *Charles M. Paschal, Jr., Acting Regional Director of the Fifteenth Region of the National Labor Relations Board* v. *Building and Construction Trades Council of New Orleans, AFL-CIO,* Civil Case No. 14128, should constitute the entire record in this case. On March 19, 1964, the Board approved the stipulation, ordered transferral of the proceedings to the Board, and granted permission to the parties to file briefs. Briefs were filed by the Respondent, Charging Party, and General Counsel. On October 12, 1964, the Board, pursuant to notice, heard oral argument at Washington, D. C., in which all parties participated.[1]

Upon the basis of the aforesaid stipulation and the entire record in the case, and having considered the briefs of the parties and the positions advanced at oral argument, the Board makes the following:

Findings of Fact

I. *The business of the Employers*

Markwell and Hartz, Inc., is a Tennessee corporation engaged as a general contractor in the building and construction industry with its principal office and place of business in Memphis, Tennessee. In the operation of its business, M & H annually receives in excess of $50,000 for services performed outside the State of Tennessee. At all times material herein, M & H has been engaged as general

[1] The Building and Construction Trades Department, AFL-CIO, filed a brief as *amicus curiae* and argued orally in support of Respondent's position. District 50, United Mine Workers, also appeared as *amicus curiae* and participated in the argument in support of the charging Party and General Counsel.

contractor on the filtration plant expansion of East Jefferson Water Works District No. 1, Jefferson Parish, Louisiana. In connection with this construction job, M & H will receive goods and materials from outside the State of Louisiana valued in excess of $50,000.

Binnings Construction Company, Inc., herein called Binnings, and Walter J. Barnes Electrical Company, herein called Barnes, are engaged as pile driving and electrical contractors, respectively, in the building and construction industry.

The parties concede and we find that M & H is engaged in commerce and that Binnings and Barnes are engaged in an industry affecting commerce, within the meaning of Section 2(6) and (7) of the Act.

II. *The labor organization involved*

We find that Respondent Building and Construction Trades Council of New Orleans is a labor organization within the meaning of Section 2(5) of the Act.

III. *The unfair labor practices*

A. THE FACTS

In the period covered by the complaint, M & H was the general contractor on a project for expansion of a filtration plant on the premises of the East Jefferson Water Works, District No. 1, in Jefferson Parish, Louisiana. M & H decided to perform about 80 percent of the project with its own employees while subcontracting the balance. Included in the work contracted out was the pile-driving awarded to Binnings, and the electrical work awarded to Barnes. Both Binnings and Barnes employ members of craft unions affiliated with Respondent.

The East Jefferson Water Works is surrounded by a chain-link fence, with two vehicular gates on Jefferson

Highway which bounds the property on the north, and two additional gates on Arnoult Road, bounding the premises on the east. The gate on Jefferson Highway closest to Arnoult Road is the principal gate insofar as the construction project is concerned, and is called the main gate. On Arnoult Road the northern-most gate is the warehouse gate while the southern-most shall be referred to as the rear gate.

At all times material, Respondent has been engaged in a primary labor dispute with M & H, and has had no dispute with either Binnings or Barnes.

On October 17,[2] in connection with its dispute with M & H, Respondent commenced picketing the gates leading to the jobsite. The picketing took place during normal work hours, with the number of pickets varying from one to three individuals. The picket sign listed both the rates that should be paid on the job and carried the following message:

MARKWELL AND HARTZ
GENERAL CONTRACTOR
DOES NOT HAVE A SIGNED AGREEMENT WITH
THE BUILDING AND CONSTRUCTION
TRADES COUNCIL OF NEW ORLEANS
AFL-CIO

The picketing continued until enjoined in the aforementioned 10(1) proceeding on January 16, 1964. At no time during the picketing did employees of Binnings or Barnes cross the picket line to perform work in connection with their employers' subcontract.

The validity of Respondent's picketing prior to October 23 is not in issue. However, on that date M & H posted the two gates on Jefferson Highway and the warehouse gate

[2] Unless designated, all dates refer to 1963.

on Arnoult Road, reserving them for use of subcontractors and persons making deliveries to the project, and prohibiting their use by M & H's employees. The rear gate on Arnoult Road was designated for exclusive use of the latter.

That morning, when Respondent's picket encountered the newly marked gates, he moved to the rear gate which was reserved for M & H's employees. As a result, pile-driving crews employed by Binnings entered the main gate and began working. About an hour and a half later the picket returned to the main gate, and Binnings' employees walked off. M & H then decided to remove its employees, with the exception of the superintendent and project engineer, in the hope that Binnings would then be able to complete the pile-driving work. By 10 o'clock that morning its employees were off the site. Though Respondent was notified of the absence of the primary employees, the picketing continued. When Binnings' crews again honored the picket line, M & H recalled its employees. They reported to work on October 24 at 10 a.m. to complete the pile-driving work themselves.

On November 14, M & H changed the signs on the Jefferson Highway gates to indicate that these entrances were not to be used by employees of M & H or carriers and suppliers making deliveries to M & H, and that such persons were to use the rear gate on Arnoult Road. M & H informed Respondent of these changes and notified suppliers to use the rear gate only. Identical changes were made at the warehouse gate on November 16, and on December 6 the rear gate was marked as reserved for use of employees of M & H and suppliers and carriers making deliveries to M &H.

The record does not show that the gates were at any time used in a manner inconsistent with the postings. Except-

ing a brief period on October 23, and the period between December 16-20, Respondent picketed the gates which were posted for exclusive use of subcontractors and which were not used by M & H's employees and suppliers.[3]

B. Discussion

On these facts, we are asked to decide whether a union, in furtherance of a primary dispute with a general contractor in the construction industry, may lawfully engage in jobsite picketing at gates reserved and set apart for exclusive use of neutral subcontractors. In this connection, the General Counsel and Charging Party contend that Respondent's picketing of the subcontractor gates exceeded permissable bounds of primary action and, thereby, demonstrated that Respondent unlawfully sought to enmesh secondary employers in its dispute with the general contractor. The Respondent, without denying that its conduct fell within the prohibitory terms of Section 8(b)(4)(i) and (ii)(B) of the Act, argues that the picketing was at all times in furtherance of its primary dispute with M & H and protected by the "primary strike and picketing proviso."[4] Specifically, Respondent asserts that, as the work of the subcontractors purportedly related to the normal operations of M & H, the Supreme Court's decisions in *Electrical Workers Local No. 761* v. *Labor Board (General Electric Co.)*[5] and *Steelworkers* v. *Labor Board (Carrier Corp.)*,[6]

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[3] Because M & H, Binnings, Barnes, and suppliers and carriers making deliveries to M & H are the only persons identified as using the four gates, it is assumed that, after November 16, Binnings and Barnes and their employees had exclusive use of all gates save the "rear gate" set aside for M & H, its employees, and persons making deliveries to it.

[4] "Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

[5] 366 U.S. 667.

[6] 376 U.S. 492.

compel dismissal of the complaint herein. We do not agree with the Respondent's position.

In *General Electric* the Supreme Court ruled that the picketing "at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises" is lawful primary activity *unless* the following conditions exist:

> There must be a separate gate, marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer; and the work must be of a kind that would not, if done when the employer were engaged in its regular operations, necessitate curtailing those operations.[7]

Subsequently, in *Carrier Corp.*, the Court approved the Board's application of these standards so as to permit, as legitimate primary action, picketing of a gate, owned by a railroad but cut through a fence surrounding the struck employer's premises. This gate was used exclusively by neutral railroad employees entering the struck premises to perform delivery activities related to the normal operations of the struck employer.

Without passing upon whether the subcontractor gates involved herein were established and maintained in accordance with the *General Electric* requirements, we are of the opinion that the principles expressed in that case are inapposite in determining whether a union may lawfully extend its dispute with a general contractor on a construction site by picketing gates reserved for exclusive use of subcontractors also engaged on that project. Rather, we believe that this issue must be resolved in the light of the

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[7] *Electrical Workers Local No. 761* v. *Labor Board (General Electric Co.), supra*, p. 681.

Moore Dry Dock standards,[8] traditionally applied by the Board in determining whether picketing at a common situs is protected primary activity.

Unlike *General Electric* and *Carrier Corp.*, both of which involved picketing *at the premises of a struck manufacturer*, the picketing in the instant case occurred at a construction project on which M & H, the primary employer, was but one of several employers operating on premises owned and operated by a third party, the Jefferson Parish Water Works. Picketing of neutral and primary contractors under such conditions, has been traditionally viewed as presenting a "common situs" problem.[9]

Over the years, the distinction between common situs

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[8] *Sailors' Union of the Pacific (Moore Dry Dock Company)*, 92 NLRB 547. Specifically, the Board held that picketing of premises occupied by secondary employers is lawful if the following conditions are met: (a) the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

[9] See *Hermandad de Trabajadores de la Construccion (Levitt Corp.)*, 127 NLRB 900; *Eau Claire and Vicinity Bldg. & Const. (St. Bridgets Catholic Cong.)*, 122 NLRB 1341; and *Local 55 (PBM)*, 108 NLRB 363, enfd, 218 F.2d 226 (C.A. 10). The Board, in the *PBM* case, rejected a contention that, where the union's dispute is with the general contractor, the entire project must be viewed as the primary situs, stating at p. 366, that:

> The Supreme Court has rejected the view that prime contractors and subcontractors working on a construction project constitute for present purposes a single integrated operation. The Supreme Court has agreed with the Board "in its conclusion that the fact that the contractor and subcontractor were engaged in the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other." *N.L.R.B.* v. *Denver Bldg. Council*, 341 U.S. 675, at 689-690.

picketing and that which occurs at premises occupied solely by the struck employer has been a guiding consideration in Board efforts to strike a balance between the competing interests underlying the boycott provisions of the Act.[10] Mindful of the fact that "Congress did not seek, by Section 8(b)(4), to interfere with the ordinary strike," [11] the Board has given wide latitude to picketing and related conduct confined to the sole premises of the primary employer.[12] On the other hand, in the interest of shielding "unoffending employers" from disputes not their own, the Board has taken a more restrictive view of common situs picketing, requiring that it be conducted so as "to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees." [13]

In accordance with the foregoing, the Board, in determining whether a labor organization, when picketing a common situs, has taken all reasonable precaution to prevent enmeshment of neutrals, traditionally applies the limitations set forth in the *Moore Dry Dock* case. In our opinion application of these standards to all common situs situations, including those, which like the instant case, involve

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[10] It is the duty of the Board to balance "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 692.

[11] *International Rice Milling Co.* v. *N.L.R.B.*, 341 U.S. 665, 672.

[12] See *Oil Workers International Union (Pure Oil Company)*, 84 NLRB 315; *Newspaper & Mail Deliveries' Union (Interborough News Co.)*, 90 NLRB 2135; *International Brotherhood of Teamsters (Di Giorgio Wine Co.)*, 87 NLRB 720, 744-746, affd. 191 F. 2d 642 (C.A. D.C.); *Retail Fruit & Vegetable Clerks' Union (Crystal Palace Market)*, 116 NLRB 856, 860, footnote 10, enfd. 249 F. 2d 591 (C.A. 9).

[13] *Crystal Palace Market, supra*, p. 859.

picketing of gates reserved exclusively for neutral contractors on a construction project, serves the "dual congressional objectives" underlying the boycott provisions of the Act.

The instant facts, when considered in the light of the legislative history and decisional precedent, do not warrant a departure from our long established policy with respect to common situs picketing. Quite to the contrary, our continued adherence to the *Moore Dry Dock* standards in such cases comports with the clear expression of Congress, in enacting the "primary strike and picketing" proviso, that said proviso ". . . does not eliminate, restrict, or modify the limitations on picketing at the site of a primary dispute that are in existing law."[14] Nor do the Supreme Court's decisions in *General Electric* and *Carrier* detract from our conclusions in this regard; for, the mere fact that picketing of a neutral gate *at the premises of a struck employer,* may in proper circumstances be lawful primary action, does not require a like finding when a labor organization applies *direct* pressure upon secondary em-

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[14] As indicated by the following statement on the part of the House conferees, the enactment of specific language protecting primary activity was accompanied by express preservation of the *Denver Building Trades* and *Moore Dry Dock* cases:

> . . . the amendment adopted by the committee of conference contains a provision "that nothing contained in clause (B) of this paragraph (4) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The purpose of this provision is to make it clear that the changes in Section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law. See, for example, *N.L.R.B.* v. *Denver Building and Construction Trades Council, et al.* (341 U.S. 675 (1951)); . . . *Moore Dry Dock Co.*, (81 NLRB 1108) [sic] . . . *Legislative History of the Labor Management Reporting and Disclosure Act of 1959*, Volume 1, page 942.

ployers engaged on a *common situs.*[15] That the Supreme Court had no intention of overriding this historic distinction is evidenced by its express approval of the *Moore Dry Dock* standards,[16] and its observation that the *General Electric* case did not present a common situs situation to which the *Moore Dry Dock* standards should apply.[17] It is plain, therefore, that the Court did not seek to interfere with the Board's traditional approach to common situs problems;[18] rather, the Court's decision in *General Electric* and *Carrier Corp.*, merely represent an implementation of the concomitant policy that lenient treatment be given to strike action taking place at the separate premises of a struck employer.

Applying the *Moore Dry Dock* standards[19] to the instant case requires the timing and location of the picketing and the legends on the picket signs to be tailored to reach the employees of the primary employer, rather than those of the neutral employer, and deviations from these requirements establish the secondary object of the picketing and render it unlawful. Indeed, our dissenting colleagues do not disagree with this principle, but cite the *PBM* decision[20]

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[15] The diverse inferences to be drawn from economic pressures applied to neutrals at the premise of a struck employer and that applied at a common situs were recognized in early decisions of the Supreme Court interpreting Section 8(b)(4). Thus, in *N.L.R.B.* v. *Local 74, United Brotherhood of Carpenters (Ira A. Watson Company)*, 341 U.S. 707, in finding a union's inducement of work stoppages at a common situs to be secondary and unlawful, the Court distinguished *International Rice Milling Co., supra*, pointing out at page 712, that picketing at the premises of the struck employer was not involved.

[16] *Local 761, IUE* v. *N.L.R.B. (General Electric Co.), supra*, p. 679.

[17] *Steelworkers* v. *N.L.R.B. (Carrier Corp.), supra*, p. 497.

[18] As stated by the Supreme Court in *Denver Building and Construction Trades Council, supra*, p. 692; "the Board's interpretation of the Act and . . . application of it in doubtful situations are entitled to weight."

[19] *Supra*, footnote 8.

[20] *Supra*, footnote 9.

with apparent approval. If the mere failure, as in *PBM*, to name the general contractor on the picket signs as the sole disputant suffices to demonstrate that a union is seeking to induce employees of the subcontractors not to work, it is self-evident that picketing a gate used solely by the neutral subcontractors demonstrates the same purpose. And if it is unlawful to induce such employees in the indirect, and more subtle, fashion represented by the facts in *PBM*, it is *a fortiori* unlawful in the direct inducement of such employees at a separate gate. *PBM*, in short, stands for the proposition that the relationship of a subcontractor to a general contractor does not make the former's employees fair game in connection with a union's dispute with the latter. The sole difference between *PBM* and the instant case lies in the means used to convey the union's respective messages to the employees of the neutral subcontractors. That this is an irrelevant difference is established by the Supreme Court's holding, in *International Brotherhood of Electrical Workers* v. *N.L.R.B. (Samuel Langer)*,[21] that "The words 'induce and encourage' are broad enough to include in them every form of influence and persuasion." Since Respondent's picketing at the neutral gates of Binnings and Barnes continued after *November 16*, we find, in agreement with the General Counsel, that the picketing after that date[22] failed to comply with the *Moore Dry Dock*

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[21] 341 U.S. 694, 701-702.

[22] We do not regard, as unlawful, Respondent's picketing prior to November 16, as it was on that date that the respective neutral gates were first marked to preclude use by persons making deliveries to M & H. Although a common situs problem is presented where a gate is reserved for both neutral subcontractors and persons making deliveries to a struck contractor, a balance of the competing interests underlying 8(b)(4)(B) requires our respecting the traditional right of labor organizations to appeal to such deliverymen as a lawful incident of legitimate strike action against the primary employer. See *Crystal Palace Markets*, *supra*. p. 861.

In so finding, we note that, on October 23, M & H withdrew its

requirement that such action take place reasonably close to the situs of Respondent's dispute with M & H. We are completely satisfied that Respondent's picketing at the subcontractor gates was to induce strike action by employees of subcontractors with whom Respondent had no dispute. By such conduct, Respondent unlawfully sought to disrupt the operations of the neutral subcontractors and their employees and to enmesh them in the primary dispute in a manner which could not be condoned as an unavoidable by-product of legitimate primary picketing.

The dissent does not persuade us otherwise. The dissent's analysis, although well-stated and on first reading not unreasonable as an application of *General Electric* standards in a construction industry setting, nevertheless runs counter to firmly established principles governing common situs picketing in that industry. Simply because the work of the neutral subcontractors in one sense is "related to M & H's normal operations," our dissenting colleagues would exonerate the pickets' appeal to the secondary employees to honor the picket line aimed at M & H. And notwithstanding their suggestion (in footnote 35) that they would apply the "related work" standard only where

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employees for a 24-hour period in an attempt to prevent any legitimate picketing of the project. It is apparent that the primary employees were removed from the project though work was then available for them, that they could have been recalled at any time, that M & H's superintendent and project engineer remained on the job at all times, and that M & H otherwise continued its duties as general contractor during the 24-hour absence of its employees. In the circumstances, we are satisfied that despite the removal of its workers, M & H was then engaged in its normal business on the project, and that Respondent's continued picketing during this period fully complied with *Moore Dry Dock*, and did not evidence a departure from what at that time constituted lawful primary action. *Local 3, IBEW, AFL-CIO (New Power Wire and Electric Corp.)*, 144 NLRB 1089; *IBEW, Local 861, AFL-CIO (Brownfield Electric, Inc.)*, 145 NLRB 1163; and *Seafarers' International Union* v. *N.L.R.B. (Salt Dome Production Co.)*, 265 F. 2d 585 (C.A. D.C.).

the dispute is with a general contractor, the plain logic of their position is equally applicable where the primary dispute is with a building construction *sub*contractor whose employees are working closely with employees of other subcontractors or those of the general contractor. Given the close relation—which is not only characteristic of but almost inevitable at many stages of a building construction project—of the work duties of the various other employees with those of the primary subcontractor, the principle of the dissent would also permit picket line appeals to the employees of the neutral general contractor and other subcontractors whatever the situation as to common or separate gates.

But it was precisely this claim, that the *close* working relations of various building construction contractors on a common situs involved them in a common undertaking which destroyed the neutrality and thus the immunity of secondary employers and employees to picket line appeals, that the Supreme Court rejected in *Denver Building Trades*. And there is not the slightest intimation by the Court in *General Electric* or *Carrier* that it was reversing or revising the rule in *Denver*. Although our dissenting colleagues disclaim such a purpose, by applying the "close relation to normal operations" test of *General Electric*, the theory of the dissent, if logically extended, is one that would in effect reverse *Denver* not only where the overarching general contractor on the building site is the primary employer, but also, where the intertwined work of a construction *sub*contractor is the primary target.

We are not constrained, without much plainer indications laid down by the Court in an entirely different set of circumstances to a situation in which the prior Board and Court interpretations of the statutory protection established for neutrals are clear and have been long understood

by the parties to labor-management relations and by the Congress.[23]

For the reasons stated, we conclude that Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by inducing employees of Binnings and Barnes to engage in work stoppages, and by restraining and coercing said Employers, for an object of forcing or requiring them to cease doing business with M & H.

IV. *The effects of the unfair labor practice upon commerce*

The activities of the Respondent set forth above, occurring in connection with the operations of M& H, Binnings, and Barnes as set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The remedy*

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action that we find necessary to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, we adopt the following:

CONCLUSIONS OF LAW

1. Markwell and Hartz, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Binnings Construction Company, Inc., and Walter J. Barnes Electrical Company are persons engaged in an

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[23] See for example the recurrent hearings and Committee reports on consideration of "situs picketing" legislation.

industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

4. By inducing individuals employed by Binnings Construction Company, Inc., and Walter J. Barnes Electrical Company to engage in a strike or refusal in the course of their employment to perform services, with an object of forcing said persons to cease doing business with Markwell and Hartz, Inc., Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(B), and Section 2(6) and (7) of the Act.

5. By threatening, coercing, and restraining Binnings Construction Company, Inc., and Walter J. Barnes Electrical Company, with an object of forcing said persons to cease doing busines with Markwell and Hartz, Inc., Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B), and Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Building and Construction Trades Council of New Orleans, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing individuals employed by Binnings Construction Company, Inc., and Walter J. Barnes Electrical Company to engage in a strike or refusal in the course of their employment to perform services, where an object thereof is to force or require said persons to cease doing business with Markwell and

Hartz, Inc., under circumstances prohibited by Section 8(b)(4)(i)(B) of the Act.

(b) Threatening, restraining, or coercing Binnings Construction Company, Inc., and Walter J. Barnes Electrical Company, where an object thereof is to force or require said persons to cease doing business with Markwell and Hartz, Inc., under circumstances prohibited by Section 8(b)(4)(ii)(B) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at their business offices and meeting halls, in New Orleans, Louisiana, copies of the attached notice marked "Appendix."[24] Copies of said notice, to be furnished by the Regional Director for Region 15, shall, after being duly signed by the Union's representative, be posted by the Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to the Regional Director for Region 15 sufficient copies of said notice, to be furnished by him, for posting by Binnings Construction Company, Inc., and Walter J. Barnes Electrical Company, if willing.

(c) Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

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[24] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order".

Dated, Washington, D. C.

Frank W. McCulloch, Chairman

Gerald A. Brown, Member

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Members Fanning and Jenkins, dissenting:

We dissent from the majority's conclusion that Respondent violated Section 8(b)(4)(B) of the Act by picketing, in the course of its primary dispute with Markwell & Hartz, gates reserved for employees of the subcontractors M & H had engaged to aid it in performing the construction work it was obligated to complete. In our view, the majority has inferred that Respondent's picketing was for an unlawful object simply from the fact that the reserved gates were used only by secondary employees, without inquiry into the question of whether the appeals to such employees, were, in the circumstances of this case, permissible primary activity, an inquiry which we believe is required by the Supreme Court's decisions in *General Electric*[25] and *Carrier Corp.*[26] As we believe, for reasons stated below, that the Court is those decisions applied principles of general application, we dissent from the majority's conclusion that the tests announced in *General Electric* for determining whether appeals to employees of neutral con-

[25] *Local 761, IUE* v. *N.L.R.B. (General Electric)*, 366 U.S. 667.

[26] *United Steelworkers of America, AFL-CIO* v. *N.L.R.B. (Carrier Corp.)*, 376 U.S. 492.

tractors constitute legitimate primary activity are not applicable to the building and construction industry.

In its initial decision in *General Electric*,[27] the Board held that picketing of a gate reserved by the primary employer for the exclusive use of employees of neutral contractors engaged by it to perform work on its premises was unlawful because the union's object was "to enmesh these employees of the neutral employers in its dispute with the Company" by encouraging them to engage in concerted action "with an object of forcing the independent contractors to cease doing business with the Company." The Circuit Court of Appeals for the District of Columbia granted enforcement[28] and the Supreme Court accepted the case for review because "the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification."[29]

The Court's opinion contained a thorough survey of the cases dealing with secondary picketing activity, including common situs cases, and it is apparent that the Court was concerned with defining with particularity the distinction between legitimate "primary activity" and banned "secondary activity." Conceding that the distinction between the two types of activity "does not present a glaringly bright line," the Court noted that the Act compels the task of drawing lines "more nice than obvious," and in a carefully considered statement which obviously applies to the entire spectrum of secondary boycott cases reminded the Board that

> Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other

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[27] 123 NLRB 1547.

[28] 278 F.2d 282.

[29] *General Electric, supra*, at 671.

> motives there may be and however small the chances of success. (citation omitted) *But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer.* (citation omitted) [Emphasis supplied.]

The underscored sentence from the above quotation succinctly states the issue which the Board must decide in this case: was Respondent's picketing for an object of inducing employees of the neutral subcontractors to take action to force their employers to cease dealing with M & H; or was its object merely to induce such employees to respect the picket line thrown up around M & H's operations, and, if so, does such activity constitute legitimate primary activity? This issue is no different from the issue posed by the facts in the *General Electric* case itself, for there the Board inferred an unlawful object simply from the fact that the picketing called into question by the complaint occurred at a gate not used by primary employees, and was directed solely to neutral employees. The whole thrust of the Court's *General Electric* decision and the *Carrier Corporation* decision is that the inference of unlawful object cannot be based simply on the fact that the picketing occurs at gates used solely by neutral employees, for the proviso to Section 8(b)(4)(B) protects all primary strike pressures which are applied with the object of

> halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike: it also saved primary picketing from the ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise con-

> tributing to the operations which the strike is endeavoring to halt. In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for neutral deliverymen furnishing day-to-day service essential to the employer's regular operation.[30]

The Court expressly rejected the view of the Court of Appeals for the Second Circuit "that picketing at the site of a strike could be directed at secondary employees only where incidental to appeals to primary employees." In so doing, the Court firmly established the proposition that direct appeals to employees of neutrals "whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt" constitute protected primary activity.

But it is not only direct appeals to employees of suppliers and deliverymen which were found to constitute direct primary action. The *General Electric* case involved appeals to employees of neutral subcontractors and the Court, noting that "the key to the problem is found in the type of work that is being performed by those who use the separate gate," held that, before such appeals may be ruled unlawful under Section 8(b)(4)(B),

> There must be a separate gate, marked and set apart from other gates: the work done by the men who use the separate gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were

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[30] *Carrier Corp, supra.* In the *General Electric* decision the Court stated the same proposition in the following form: ". . . if a separate gate were devised for regular plant deliveries, the barring of picketing at that gate would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations."

> engaged in its regular operations, necessitate curtailing those operations.

The crucial consideration regarding this holding is not, as the majority apparently views it, that it was made with respect to conduct occurring in connection with a strike at an industrial plant, but that it held that appeals to respect a picket line made to employees of secondary employers whose operations do not meet the tests stated above constitute legitimate primary activity just as do similar appeals to employees of neutral suppliers and deliverers.

In view of the foregoing, we find, contrary to the majority opinion, that the principles set forth in the *General Electric* decision, and the tests there enuciated by the Court for the application of those principles, govern picketing in the construction industry as well as in other industries. In view, neither the fact that the Court expressly approved the *Moore Dry Dock* standards, nor its holding that the *General Electric* case did not present a common situs situation to which those standards should be applied, requires a different conclusion. The *Moore Dry Dock* standards were not designed to restrict primary activity at common situs disputes, but rather to assure that banned secondary activity would not be permitted, and though the Court did express approval of those standards, it noted too that

> As is too often the way of law or, at least, of adjudications, soon the *Dry Dock* tests were mechanically applied so that a violation of one of the standards was taken to be presumptive of illegal activity. For example, failure of picket signs clearly to designate the employer against whom the strike was directed was held to be violative of 8(b)(4)(A). (Citation omitted).

Furthermore, it is clear that, had the Board concluded in

its decision on remand in the *General Electric* case[31] that the work of the neutral contractors was not directly related to General Electric's normal operations, the application of the *Moore Dry Dock* tests to the picketing of the reserved gate in that case would be permissible.

The majority declines to apply the *General Electric* tests to common situs picketing in the building and construction industry because, in its view, historic Board policies governing common situs picketing require that such picketing be conducted so as "to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees" and because "the Court's decisions in *General Electric* and *Carrier Corp.*, merely represent an implementation of the concomitant policy that lenient treatment be given to strike action taking place at the separate premises of a struck employer." The logic of the first quotation is simply that common situs picketing must be confined to direct appeals to the employees of the primary employer and that appeals to employees of neutrals are permissible only where incidental thereto—a view expressly repudiated by the Supreme Court in *Carrier Corp., supra*, p.498. Under such logic, there is no warrant for the majority's conclusion that the picketing of the re-

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[31] 137 NLRB 342. In this connection, the Board found that construction operations performed by contractors for General Electric, whose employees also were engaged in similar construction work, were "directly related" to General Electric's operations, thus giving the union engaged in a primary dispute with General Electric the right to make direct appeals to employees of the neutral contractors to honor its picket line. It is ironical, to say the least, for the majority now to hold that the undisputed direct relationship which does exist between the operations of general contractors and their subcontractors in the building and construction industry goes for nought in determining whether a striking union's picket line publication of its primary dispute with the general contractor, with consequent appeals to neutral employees to respect the picket line, constitutes legitimate primary activity.

served gate did not violate 8(b)(4)(B) prior to November 16 because the gates were being used by employees making deliveries to M & H. The majority's conclusion is flatly inconsistent with the very principles it states it is applying to this case.

We, of course, do not quarrel with the conclusion that Respondent had the right to appeal to employees delivering supplies and materials to M & H to respect the picket line, for such conclusion, grounded as it inescapably is on the premises underlying the Supreme Court's decision in *Carrier Corp.*, seems eminently correct, and in no way obstructive of the Board's obligation to prohibit unlawful secondary activity under Section 8(b)(4)(B). It undoubtedly is too late in the day to argue that appeals to employees making deliveries to a primary employer in the construction industry are not legitimate primary activity. Certainly, it cannot be so argued on the faulty premise that Congress intended "more lenient" treatment of picketing at industrial sites than it intended for picketing of sites in the building and construction industry. Indeed, if the special treatment accorded the building and construction industry in Section 8(e) and 8(b)(4)(A) is considered, it could be argued that Congress intended that more "lenient treatment" be given to secondary activity in building and construction industry than in manufacturing industries generally.[32] We do not rest our position in this case on that ground, however. Rather, we believe that, because the Supreme Court clearly equated picket line appeals to employees of neutral subcontractors whose tasks aid the every day operations of the struck employer with similar appeals to employees of neutral suppliers and deliverers, there is

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[32] The majority advances no reason why an employer in the construction industry should be permitted to designate or limit the places of primary activity against him, while those in other industries may not do so.

no warrant for distinguishing between the two situations in this case, as the majority has done. As the Court determined that such appeals constitute primary activity protected from the reach of 8(b)(4)(B) by the proviso thereto, unless the neutral contractor's operations meet certain tests, we believe it incumbent upon the Board to determine whether such tests are met, and we see no particular difficulty in applying the *Moore Dry Dock* standards in a manner entirely consistent with such tests.

Significantly, Congress has not seen fit to distinguish between industries, by adopting a more narrow definition of the lawful scope of picketing in the construction industry than is permitted in other industries. Certainly, the economic pressure sustained by neutral subcontractors as a consequence of reserved gate picketing on a construction job is no different from that imposed by like conduct upon neutral subcontractors performing work on premises occupied by a struck manufacturer. Nor is it any different from the pressures sustained by neutral suppliers making deliveries to the struck primary employer whether he be a manufacturer or a general contractor in the building and construction industry. Accordingly, it is only by determining the legality of reserved gate picketing by standards generally applicable to all industries that the dual Congressional objectives[33] are served and the competing interests of picketing unions and secondary employers protected.

Nor do we regard the Court's decision in *Denver Building and Construction Trades Council*[34] as precluding application of *General Electric* to the instant case. In *Denver*, the Court held that despite their close relationship, the several contractors on a construction job were not allies

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[33] *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 692; Local 761, *IUE* v. *N.L.R.B. (General Electric)*, *supra*.

[34] *Id.*

or a single employer for purposes of the boycott provisions of the Act.[35]

The Supreme Court in *General Electric* affirmed the rule stated in *Denver* and, accepting the separate legal status

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[35] *Id.*, pp. 680-690. In *Denver*, the conduct evidencing the union's objective of enmeshing the neutral employer was its demand that the neutral general contractor remove a nonunion subcontractor from the project, which demand was accompanied by picketing which failed to disclose that the Respondent Council's primary dispute was only with a nonunion subcontractor. These facts plus the other factors supporting the finding that the picketing constituted a "signal in the nature of an order to the members of the affiliated unions to leave the job and remain away until otherwise ordered" demonstrated the secondary objectives of the picketing, and distinguishes that case from the instant case. Here, in contrast, the Respondent's primary dispute is with the general contractor and the picketing clearly discloses this fact. Similarly too, the *PBM* decision relied on by the majority is distinguishable from the instant case in that the picket signs did not satisfy the *Moore Dry Dock* requirement of clearly disclosing that the union's primary dispute was with the insurance company-general contractor, and the conduct of the Respondent unions vis-a-vis neutral employees and subcontractors working on the "unfair" project was such as to lead the Board and the Court of Appeals to conclude that the picketing was directed against the subcontractors to cause them to cease doing business with the general contractor. Thus, those cases illustrate instances where a union's pressures were aimed directly at employees of neutral employers in order to induce them to engage in concerted action to force their employers to cease doing business with the primary employer. We have no quarrel with the requirement that a union's picketing at a common situs must clearly disclose that its dispute is with the primary employer. We in fact insist upon observance of that requirement but, when it and the other *Moore Dry Dock* requirements are observed, we believe that there is no warrant for inferring that the picketing is for an object other than to induce employees to honor the picket line. In view of the *General Electric* decision, we believe that the *Moore Dry Dock* tests cannot be applied in a manner which will bar primary appeals to employees of employers whose operations are directly related to the normal operations of the struck employer. In so finding, we do not imply that simply because a union has a dispute with one subcontractor on a construction project, appeals to employees of other subcontractors using different gates constitute primary appeals within the meaning of the *General Electric* decision. *Northern California District Council of Hod Carriers and Common Laborers of America, AFL-CIO, et al. (Joseph's Landscaping Service)*, 154 NLRB No. 116. *Painters District Council No. 38, Brother-*

of *General Electric* and its contractors,[36] addressed itself to the question whether the picketing involved had an unlawful secondary objective. Here, too, we accept the proposition that the various contractors at a construction job are separate employers[37] and concern ourselves only with the circumstances under which the Board, absent direct proof of admission, may properly infer that the picketing involved had an unlawful secondary objective.

In applying the *General Electric* standards to the instant case, we find that the work of Binnings and Barnes was related to the normal operations of M & H, the general contractor. In this connection it is relevant that employees of the named subcontractors were scheduled to work during

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hood of Painters, Decorators and Paperhangers of America, AFL-CIO (Edgewood Contracting Company), 153 NLRB No. 70. See also *Orange Belt District Council of Painters No. 48, AFL-CIO (Calhoun Drywall Company)*, 154 NLRB No. 83. In such situations, the work of the employees of the neutral general contractor and subcontractors, though obviously bearing a close relationship to the work of the primary employees, is nevertheless not work which the primary subcontractor has obligated himself to perform or which lies within his power to control or to assign to whomsoever he sees fit. It is therefore not "related to the normal operations of the [primary] employer" nor does it "otherwise contribut[e] to the operations which the strike is endeavoring to halt" within the meaning of the *General Electric* and *Carrier* decisions. In similar fashion, we would not, in the direct converse of the *General Electric* case where the primary dispute is with a *General Electric* subcontractor, apply the *General Electric* principles to preclude *General Electric* from setting up separate gates for its own employees and those of subcontractors not involved in the dispute for the purpose of confining the picketing to those gates used by the employees of the struck primary subcontractors and his suppliers.

[36] In *General Electric*, the Board's finding that the primary and secondary employers were not allies (123 NLRB 1547, 1548, footnote 3) was not disputed and was part of the record before the Supreme Court in its consideration of the case.

[37] For an illustration of legal principles and proposed legislative language which would overrule the *Denver Building Trades* decision, see the recurrent hearings and Committee reports on consideration of "common situs picketing" amendments to the Act. Comparison of such pro-

the picketing period together with the employees of M & H in completing the filtration plant expansion job.[38] In addition, during this period, M & H's project engineer and superintendent were to work with the subcontractors to insure that M & H's commitment to the owner was performed in compliance with project specifications. We find that M & H's portion of the work on this job was part of its normal operations, as was completion of the entire project, and that the work of the subcontractors was related to both M & H's work on the job and its responsibility to complete the project itself, and hence related to M & H's normal operations.[39] We, accordingly, hold that the work of the

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posed amendments with our decision herein clearly reveals that the application of the *General Electric* principles to the construction industry does not constitute reversal of the *Denver Building Trades* principle that the various contractors and subcontractors on a construction project are separate employers doing business with each other within the meaning of Section 8(b)(4) of the Act, our colleagues assertion to the contrary notwithstanding. Whether such legislation is or is not in the public interest is, of course, for the Congress to determine. We are not constrained, however, by such current consideration of a complex issue, to hold, as does the majority, that application of general principles enunciated by the Supreme Court must be limited to the precise set of circumstances that occasioned their formulation.

[38] M & H undertook to perform about 80 percent of the project with its own employees, while subcontracting the balance. It also appears that M & H in certain instances could not work until completion of a subcontractor's phase of the job, while in others subcontractors would have to hold up while M & H was performing.

[39] In so finding, we reject the General Counsel's view that the "unrelated work" condition is met unless the work is "identical or substantially similar" to that of the primary employer. The work of those using the reserved gate may be related to the normal operations of the primary employer though not "identical or substantially similar" to that normally performed by the latter. *General Electric*, 138 NLRB 342. Thus, in the portion of that decision dealing with the construction of a truck dock and mezzanine, the Board held the work of the neutral contractors to be related to the struck manufacturer's normal operations despite the finding that "the portion of the work scheduled to be done by the independent contractors on these jobs was not the type that previously had been done by GE employees." Also, see the Board's decision in *Carrier*

subcontractors failed to meet the "unrelated work" condition[40] and, on this basis, we find that Respondent had the right to appeal to the employees of the subcontractors to honor its picket line around M & H's operations.

This being the case, the fact that such appeals were addressed to those employees at gates reserved for their exclusive use by M & H furnishes no basis for the majority's conclusion that the picketing after November 16 "failed to comply with the *Moore Dry Dock* requirement that such action take place reasonably close to the situs of Respondent's dispute with M & H." As the Supreme Court indicated in the *General Electric* decision, the barring of picketing through the device of a gate reserved for the exclusive use of secondary employees whose tasks aid the struck employer's every day operations constitutes a clear invasion of traditional primary activity. Furthermore, the *Moore Dry Dock* tests are utilized by the Board to aid it in determining whether certain kinds of picketing constitute proscribed secondary or protected primary activity whereas the *General Electric* tests are designed to aid in determining whether a union has the right to appeal directly to the secondary employees using a reserved gate. Accordingly, it seems obvious that the former tests must be applied in a manner which will give full effect to the latter tests. As we find that Respondent had the right to appeal to the employees of the neutral subcontractor, we find that the picketing at the reserved gates constituted compliance with the requirement that its picketing be

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Corp. 132 NLRB 127, where the "related work" finding was not based upon evidence that employees of the struck manufacturer had performed work identical or substantially similar to that scheduled for the neutral railroad employees.

[40] Having found that the work of those using the reserved gate was directly related to the normal operations of M & H, we need not decide whether, or under what circumstances, the "interruption of operations" test applies to reserved gate picketing in the construction industry.

limited to places reasonably close to the situs of Respondent's dispute with M & H. Accordingly, as the picketing also conformed to the other *Moore Dry Dock* tests, we perceive no basis on which to conclude that Respondent's object in picketing the reserved gates was to induce the employees of M & H's subcontractors to engage in a refusal to perform services with the object of forcing their employers to cease dealing with M & H.

Accordingly, we would find that Respondent's picketing did not violate Section 8(b)(4)(B), and we would dismiss the complaint.

Dated, Washington, D. C.

John H. Fanning, Member

Howard Jenkins, Jr. Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151, *et seq.*), are as follows:

* * * * *

UNFAIR LABOR PRACTICES

* * * * *

Section 8. (b) [29 U.S.C. § 158(b)] It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *